



**State of New Hampshire**

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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CITY OF MANCHESTER POLICE	:	
DEPARTMENT	:	
	:	
Complainant	:	
	:	CASE NO. P-0706:23
v.	:	
	:	DECISION NO. 92-13
INTERNATIONAL BROTHERHOOD OF	:	
POLICE OFFICERS, LOCAL 394	:	
	:	
Respondent	:	
_____		:

APPEARANCES

Representing the City of Manchester Police Department:

David A. Hodgen, Chief Negotiator

Representing IBPO, Local 394:

James T. Masteralexis, Esq.

Also appearing:

Louis J. Craig, Manchester Police  
Steven Creamer, I.B.P.O.  
Edward Kelly, I.B.P.O.

BACKGROUND

By complaint of April 9, 1991, the City of Manchester (City) filed improper practice charges (ULP) against the International Brotherhood of Police Officers, Local 394 (Union) for an alleged violation of RSA 273-A:5, II (f), breach of the parties' collective bargaining agreement. More specifically, the City has alleged that the Union has breached that agreement by attempting to process the termination of Officer Steven Creamer under the grievance procedure of the contract. By filing of May 7, 1991, Local 394, by and through its counsel, James T. Masteralexis, Esq. filed an answer requesting that the charge be dismissed and that the matter proceed to arbitration. By filing of May 14, 1991, the City amended its complaints prompting an amended response filing of May 21, 1991. The case was set for and heard by the Board on August 8, 1991. On November 8, 1991, the City filed a Motion to Stay Arbitration Proceedings scheduled by the American Arbitration Association to be heard on November 14, 1991. By letter of November 14, 1991, that motion was granted "until such time that this Board can render its

decision regarding the hearing on this case."

The very basic issue in this case involves whether it should be the grievance procedure of the collective bargaining agreement or the Rules and Procedures of the police department which control the appellate avenues open to the Office Creamer. The initial ULP indicates that Officer Creamer was disciplined in the fall of 1990 "in accordance with the Police Department's standard operating procedure and he was terminated on November 21, 1990." Following that termination, Creamer appealed to the Police Commission which upheld his discharge. The charges in this case were precipitated when Creamer then attempted to proceed to arbitration under the grievance procedure when his union filed a demand for Arbitration with the American Arbitration Association on May 14, 1991, rather than appealing to Superior Court as provided in the Standard Operating Procedure.

#### FINDINGS OF FACT

1. The City of Manchester Police Department (City) is a public employer within the meaning of RSA 273-A:1, X.
2. The International Brotherhood of Police Officers, Local 394 (IBPO) is the duly certified exclusive representative of all regular full-time police officers, and police women, all regular full-time humane officers, and all regular full-time parking control officers, excluding all other employees of the Manchester Police Department.
3. On or about June 6, 1989 the Board of Mayor and Aldermen approved and on or about June 7, 1989, the Police Commission approved the collective bargaining agreement contract between the parties for the period July 1, 1989 through June 30, 1991. The contract was signed October 19, 1989.
4. The parties' contract contains various provisions pertinent to these proceedings. They are:

##### Article II - Management's Rights:

The Commission and the Police Chief will continue to have, whether exercised or not, all the rights, powers and authority heretofore existing...will determine the standards of services to be offered...determine the standards of selection for employment, direct its employees, take disciplinary action, release its employees from duty because of lack of work or for other legitimate reasons; issue and enforce rules and regulations....All of the rights, responsibilities and prerogatives that are inherent in the Commission or Police Chief by virtue of statutory and charter provisions cannot be subject to any grievance or arbitration proceeding.

##### Article III - Employer's Right:

The IBPO and the Commission agree that ....no disciplinary action shall be taken against an employee except for just cause.

#### Article IV - Prior Benefits and Presentation of Rights

The Commission agrees that conditions of employment and working conditions previously established...shall not be less than those now in effect and will remain in effect unless specifically modified by this Agreement. Nothing in this Article will limit the rights of the Commission to revise the Rules and Regulations, policies and/or working conditions to improve the efficiency of the Department, provided, however, any such change or revision shall not be subject to the grievance procedure.

#### Article VII - Grievance Procedure

A grievance is defined a claim or dispute arising out of the application or interpretation of this Agreement, under express provisions of the Agreement...[This is followed by a five (5) step procedure ending at the Police Commission, a subsequent "pre-arbitration" step, and finally an arbitration step wherein "the decision of the arbitrator shall be final and binding upon the parties as to the matter in dispute."]

Article XII, Section 12 of the contract specifically exempts from the grievance procedure "redress of monetary claim against the City ..."

Article XVIII, Section 6 of the contract specifically exempts from the grievance procedure claims involving clothing and personal equipment allowances destroyed in the line of duty by saying "The Police Chief shall have the final decision in such matters and such decision shall not be subject to the Grievance Procedure contained in this contract."

Article XXIV, Section 1 of the contract specifically includes adverse physical examination results in the grievance procedure by saying "However, the disciplinary action, including dismissal, as a result of said physical examination shall be subject to review under the Grievance Procedure of this Agreement."

#### Article XXV - Rules and Regulations

The Rules and Regulations of the Manchester, New Hampshire, Police Department which are now in effect or as may be amended by the Police Commission shall be the prime governing factor in the conduct and actions of all police officers and every police officer shall be thoroughly conversant with them.

5. The Police Department (City) has adopted both Rules and Procedures and a Standard Operating Procedure (SOP) effective October 18, 1989, the latter of which contains a three step disciplinary procedure involving: (1) recognition, (2) counseling, and (3) punishment. The punishment step involves: (1) informal punitive actions, (2) formal punitive actions (including oral and written reprimands as well as recommendations for other actions), (3) termination and (4) appeals to a disciplinary board. Item IX (D) provides that "Every member upon receipt of formal charge[s] and [s]pecifications...will be advised of the following options: (1) Chief of Police summary punishment, (2) Disciplinary Board,

(3) Police Commission Review, and (4) Superior Court." Item IX (H) of the SOP provides, "If a member is dissatisfied with the findings and punishment of the Chief of Police, the Disciplinary Board and the Police Commission, the member has the right to appeal to Superior Court."

6. On or about November 21, 1990, Officer Creamer was terminated from the Manchester Police Department.
7. On or about January 9, 1991, the Manchester Police Commission inquired as to the status of Creamer's discipline, subsequently upholding the discharge.
8. On or about March 13, 1991, the IBPO, on behalf of Creamer, filed a Demand for Arbitration with the American Arbitration Association in Boston, Massachusetts. Thereafter the case was plead and processed as noted in the first paragraph in the "Background section," above.

#### DECISION AND ORDER

Given the hiatus between the arbitrability claimed by the IBPO and the exclusivity of remedy reserved to the SOP claimed by the City, we must look to the parties' contract in an attempt to determine the nature of their bargain or agreement. Review of that document gives mixed signals which, ultimately, must be resolved in favor of arbitrability under the doctrines set forth by the New Hampshire Supreme Court in Appeal of the Town of Pelham, 124 N.H. 131 (1983). (referenced herein as Pelham) and Appeal of Westmoreland School Board 132 N.H. 103 (1989) (referenced herein as Westmoreland) citing also to applicable U.S. Supreme Court decisions, notably Steelworkers v. Warrior & Gulf, 363 U.S. 574 (1960) (referenced herein as Warrior)

A strict reading of the Management's Right Clause, Article II, the Preservation of Rights clause, Article IV, and the Rules and Regulations clause, Article XXV, would cause one to believe that (1) the City had the unfettered right to impose discipline, and (2) to use, revise and implement rules, regulations and procedures at its pleasure, under Article II and Articles IV and XXV, respectively. Such a reading and such a conclusion would totally disregard the remaining portions of the contract. Moreover, there is no evidence that matters of discipline, such as this one, are protected as either statutory or charter provisions protected under Article II, especially given the provisions of Article III and a negotiated grievance procedure found at Article VII.

By their own actions, the parties have shown that they possess the skills to set forth, with determined specificity, those topics which should or should not be excluded from the broad scope or definition of the grievance procedure, notably monetary claims against the City (Article XII), clothing and equipment claims (Article XVII), and results of adverse physical examinations (included) Article XXIV). They did not do so with respect to discipline. (The only reservation is the reference found in Article II which conflicts with Article III and must fall when measured against the "positive assurance" test, noted below.) Instead, they have a detailed and complete grievance procedure (Article VII) which speaks to "claims or disputes arising out of the application or interpretation of this Agreement." Article III of that agreement provides plainly, simply and typically that "no disciplinary action shall be taken against an employee except for just cause."

One must conclude, without the type of specific exemption described earlier, that the parties intended to reserve issues of just cause (along with other possible issues) to the grievance procedure of the contract. For us to hold to the contrary would be tantamount to saying that we sanctioned unfettered options referenced in Article IV relative to the City's being able to "revise the Rules and Procedures, policies and/or working conditions" previously prevailing. Of course, the contract protects the City's right to do this, but not to the extent those conditions are controlled by the contract -- as is the case with just cause which should be tested by the grievance procedure when its efficacy is challenged. Otherwise, the City's ability to change working conditions or policies, midterm and unilaterally, would not only be inimical to the collective bargaining process but also contrary to the policy considerations set forth at RSA 273-A:1, XV.

Article XIV provides that the Rules and Procedures "...shall be the prime governing factor in the conduct and actions of all police officers..." We read this contract provision to mean what it says. It applies to the "conduct and actions of police officers." The action at issue in this case is a personnel action, namely the termination of Creamer and whether it was done with just cause as provided by Article III. Article XXV is not relevant to these proceedings. Article III, the just cause standard, is relevant to these proceedings and is protected by the grievance procedure (Article VII) of the contract.

We believe our findings of fact and the foregoing conclusion is consistent with the guidance found in Pelham and Westmoreland, supra. We find no evidence that either party intended to negotiate away the contract rights to grieve the just cause standard relative to the imposition of discipline when the agreement was signed in October of 1989. Pelham acknowledges that the legislative history of RSA 273-A "indicates that the hiring, firing, demotion and promotion of an employee is within the scope of bargaining under the grievance clause." (Emphasis added) Citing to Senator Jacobsen, the Court observed, "If a person is to be dismissed for some reason, he may lodge a grievance, and that may be heard." N.H.S. Journal, pp. 1108-09 (1975). In Pelham, the town reserved the right to hire, promote, transfer, assign, retain, suspend, demote or discharge employees and the union had the right to process the grievances of its members. (Emphasis added). Given that the selectmen had bargained over the matters and included their resolution in a collective bargaining agreement, they were required to abide by the negotiated grievance procedure. We believe the same conditions prevail in this case.

In Westmoreland, the New Hampshire Supreme Court said that "when a CBA [contract] contains an arbitration clause, a presumption of arbitrability exists, and "in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" quoting Warrior & Gulf 363 U.S. 574 at 584-85 (1960) AT&T Technologies, 475 U.S. 643 at 647-50 (1986)." Complainant failed to meet the "positive assurance" test cited in both Westmoreland and Warrior. We find neither an "express provision" excluding discipline and just cause from the grievance procedure nor any "forceful evidence" of a mutual intent or understanding to exclude the subject matter from arbitration during the negotiations process.

Accordingly, we find that:

1. The unfair labor practice should be and hereby is DISMISSED.

2. The parties are directed to proceed to arbitration forthwith.

So Ordered.

Signed this 23rd day of January , 1992.

  
EDWARD J. HASELTINE  
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and E. Vincent Hall present and voting.